

STATE OF MICHIGAN
COURT OF APPEALS

MICHAEL SALAH,

Petitioner-Appellant,

v

OFFICE OF FINANCIAL AND INSURANCE
REGULATION,

Respondent-Appellee.

UNPUBLISHED

August 2, 2011

No. 298894

Ingham Circuit Court

LC No. 08-000458-AA

Before: BECKERING, P.J., and FORT HOOD and STEPHENS, JJ.

PER CURIAM.

Petitioner appeals by leave granted the circuit court order denying his motion for a preliminary injunction. In 2008, petitioner's resident insurance producer license was revoked by respondent, the Officer of Financial and Insurance Regulation (OFIR), for having been convicted of a felony in 1995. Petitioner appealed the revocation to the circuit court, which affirmed. We reverse the decision of the OFIR and circuit court and remand to the OFIR for proceedings consistent with this opinion.

The pertinent facts of this case are not in dispute. In October 2005, petitioner applied to the Office of Financial and Insurance Services (now the OFIR) for a resident insurance producer license. On his application, petitioner revealed that he had a 1995 felony conviction in Colorado for possession of a schedule I controlled substance. On February 9, 2006, the OFIR licensed petitioner as a resident producer. In 2007, the OFIR commenced proceedings to revoke petitioner's license. In March 2008, the commissioner issued a final decision revoking the license. The commissioner determined that petitioner's license had been issued in error because MCL 500.1205 and MCL 500.1239 prohibited issuance of a resident insurance producer license to an individual who had been convicted of a felony.

Petitioner sought review in the circuit court, which affirmed the commissioner's decision. The court determined that MCL 500.1205 and MCL 500.1239 gave the OFIR no discretion to license an applicant with a felony conviction. The court found it persuasive that the Legislature amended the Insurance Code in 2008 to provide that "the commissioner *shall* refuse to issue a license" for "[h]aving been convicted of a felony." MCL 500.1239(1)(f) (emphasis added).

Petitioner now appeals the circuit court's decision, raising multiple challenges to the OFIR's and circuit court's interpretation of the Insurance Code. "This Court reviews a lower

court's review of an agency decision to determine whether the lower court applied correct legal principles and whether it misapprehended or grossly misapplied the substantial evidence test to the agency's factual findings." *Dep't of Labor & Economic Growth, Unemployment Ins Agency v Dykstra*, 283 Mich App 212, 222; 771 NW2d 423 (2009) (internal quotation marks and citations omitted). To the extent this case involves interpretation of the Insurance Code, our review is de novo. See *id.* at 223.

The requirements for licensing resident insurance producers are contained in MCL 500.1205. When petitioner applied for a resident insurance producer license, MCL 500.1205(1) provided, in relevant part:

An application for a resident insurer producer license shall not be approved unless the commissioner finds that the individual meets all of the following:

* * *

(b) Has not committed any act that is a ground for denial, suspension, or revocation under [MCL 500.1239].¹

MCL 500.1239 specifies the conduct or acts that are grounds for denial or revocation of a license. At the time petitioner applied for his license, this section provided, in relevant part:

(1) In addition to any other powers under this act, the commissioner *may* place on probation, suspend, revoke, or refuse to issue an insurance producer's license or may levy a civil fine under [MCL 500.1244] or any combination of actions for any 1 or more of the following causes:

* * *

(f) Having been convicted of a felony. [Emphasis added.]²

¹ The statute was amended in 2008, effective January 6, 2009. The relevant portion of section 1205 now provides:

(1) A person applying for a resident insurance producer license shall file with the commissioner the uniform application required by the commissioner and shall declare under penalty of refusal, suspension, or revocation of the license that the statements made in the application are true, correct, and complete to the best of the individual's knowledge and belief. An application for a resident insurer producer license shall not be approved unless the commissioner finds that the individual meets all of the following:

* * *

(b) Has not committed any act listed in [MCL 500.1239(1)].

The OFIR argues that when MCL 500.1205 and MCL 500.1239 are read together, it had no discretion to license a felon. This argument is premised on the language “shall not be approved” in MCL 500.1205(1). The OFIR argues that this is mandatory language and is more specific than the language contained in MCL 500.1239(1). Although the two sections seem to conflict, the OFIR argues that MCL 500.1205(1)’s language controls because it specifically pertains to the licensing of a resident producer.

We note that the legal arguments made by the OFIR mirror those made by the defendants in *King v Michigan*, 488 Mich 208; 793 NW2d 673 (2010), a case that is factually analogous to this case.³ In *King*, the plaintiff was convicted of a felony in 2000. *Id.* at 211 (opinion by DAVIS, J.). In 2004, he “applied to the Michigan Office of Financial and Insurance Services (OFIS) for a resident insurance producer license.” *Id.* The plaintiff fully disclosed his felony conviction, and the OFIS granted him his license. *Id.* at 211-212.

In 2008, the Department of Labor and Economic Growth (DLEG) and the commissioner initiated proceedings to revoke the plaintiff’s license. *Id.* at 212. They argued “that a change to the Insurance Code in 2002 had *required* the commissioner to deny plaintiff’s application, that failing to do so was a mistake, and that the current provisions of the Insurance Code require the commissioner to correct that mistake.” *Id.* (emphasis in original). The trial court held that equity precluded the DLEG and the commissioner from revoking the plaintiff’s license, and this Court affirmed. *Id.*; see also *King v Michigan*, unpublished per curiam opinion of the Court of Appeals, issued January 21, 2010 (Docket No. 288290).

The Supreme Court granted leave to appeal and affirmed on alternative grounds. The lead opinion for the Supreme Court held that the commissioner was granted discretion to license a felon under MCL 500.1205(1) and MCL 500.1239(1). The Court explained as follows:

Before 2002, the Insurance Code’s licensure provisions had required applicants to have “good moral character.” See former MCL 500.1204(4), as amended by 1986 PA 173. It remains the law today that no licensing agency may

² This statute was also amended in 2008, effective January 6, 2009. The relevant portion of section 1239 now provides:

(1) In addition to any other powers under this act, the commissioner may place on probation, suspend, or revoke an insurance producer’s license or may levy a civil fine under section 1244 or any combination of actions, *and the commissioner shall refuse to issue a license under [MCL 500.1205] or [MCL 500.1206a],* for any 1 or more of the following causes:

* * *

(f) Having been convicted of a felony. [Emphasis added.]

³ King is a plurality opinion in which Justice Hathaway joined Justice Davis’s lead opinion, and Justices Cavanagh and Marilyn Kelly concurred in the outcome. Chief Justice Young and Justices Corrigan and Markman dissented.

make a finding as to an applicant's moral character on the sole basis of a criminal conviction. MCL 338.42. It also remains the law that "[o]rders, decisions, findings, rulings, determinations, opinions, actions, and inactions of the commissioner in [the Insurance Code] shall be made or reached in the reasonable exercise of discretion." MCL 500.205.

The "good moral character" requirement in the Insurance Code's licensure provisions was replaced by 2001 PA 228. When plaintiff applied for his license, MCL 500.1205(1)(b) provided that an application "shall not be approved" if the applicant had "committed any act that is a ground for denial, suspension, or revocation under [MCL 500.1239]." While this seems mandatory when read in isolation, MCL 500.1239(1) provided that "the commissioner *may* place on probation, suspend, revoke, or refuse to issue" a license for a list of possible reasons, including an applicant's "having been convicted of a felony." MCL 500.1239(1)(f) (emphasis added). Consistent with MCL 500.205, the licensure requirement mandates that the commissioner make a discretionary judgment call when reviewing an application and deny the application if he or she concludes—in the exercise of that discretion—that denial, suspension, or revocation would be appropriate.

In other words, 2001 PA 228 replaced the ambiguous judgment call of "good moral character" with a more rigorously defined judgment call that entailed consideration of enumerated scenarios under which adverse action *may* be found appropriate. When the applicable versions of MCL 500.1205, MCL 500.1239, and MCL 500.205 are read *together*, they set forth a licensure procedure that requires the commissioner to exercise judgment within a framework, rather than exercising judgment in a more nebulous environment. We reject defendant's contention that the Insurance Code in effect in 2004 *required* the commissioner to deny plaintiff's application. The Insurance Code did not, and the commissioner's exercise of discretion in granting plaintiff a license was therefore permissible. [*King*, 488 Mich at 213-214 (emphasis in original).]

The Court went on to decide whether the 2008 amendments to the Insurance Code required that the commissioner revoke the plaintiff's license. *Id* at 215. The Court recognized that the 2008 amendments precluded the OFIR from licensing a convicted felon. *Id*. Therefore, if the plaintiff applied for a resident insurance producer license today, the commissioner would be required to deny it. *Id*. However, the Court explained that the 2008 amendments applied only prospectively:

Subsequently, 2008 PA 422 and 2008 PA 423 amended MCL 500.1205 and MCL 500.1239. MCL 500.1205 now provides in relevant part that "[a]n application for a resident insurer [sic] producer license shall not be approved unless the commissioner finds that the individual . . . [h]as not committed any act listed in [MCL 500.1239(1)]." And MCL 500.1239(1)(f) provides that "the commissioner *shall* refuse to issue a license" for "[h]aving been convicted of a felony."

These two statutes are now consistent, and were a convicted felon to apply for an insurance producer license *today*, the commissioner *would* be required to deny it. Indeed, plaintiff concedes as much. But no language in these statutes rebuts the general rule of construction that changes to a statute should only apply prospectively. Even if we were to engage in a speculation that the amendment was intended to clarify the Legislature's prior intent, amendments may not be applied retrospectively if doing so would impair a vested right. *Brewer v A D Transp Express, Inc*, 486 Mich 50, 56-57; 782 NW2d 475 (2010). The fact that an applicant like plaintiff would necessarily be denied a license today does not automatically invalidate defendant's decision to exercise its discretion to grant him a license in 2004. [*King*, 488 Mich at 215 (emphasis in original).]

The Court then addressed whether the Insurance Code gave the commissioner the discretion to revoke the plaintiff's license for being convicted of a felony. *Id.* at 216. The Court's lead opinion acknowledged that the Insurance Code gives the commissioner the discretion to revoke a license for having been convicted of a felony. *Id.* However, the Court concluded that the OFIR had abdicated its discretion:

We observe initially that the plain language of the present Insurance Code gives the commissioner the discretion to pursue revocation of plaintiff's resident insurance producer license for a variety of possible reasons, including plaintiff's having been convicted of a felony. However, we emphasize that doing so must be a "reasonable exercise of discretion." MCL 500.205. Here, the gravamen of defendants' argument is that the commissioner is required to revoke plaintiff's license. This erroneous abdication of discretion is, in itself, an abuse of discretion. *People v Stafford*, 434 Mich 125, 134 n 4; 450 NW2d 559 (1990). Therefore, in this case, the commissioner cannot be said to be engaging in a "reasonable exercise of discretion."

With regard to this issue, we hold only that the commissioner may not revoke a license on the basis of the erroneous belief that he must do so when, in fact, he has discretion. [*King*, 488 Mich at 216-217.]

We find the reasoning set forth in the lead opinion in *King* persuasive and conclude that the circuit court erred when it determined that the OFIR did not have the discretion to license petitioner. At the time petitioner applied for his license, the Insurance Code provided the commissioner with the discretion to license a felon. That the 2008 amendments removed this discretion is immaterial. Even if the amendments were clarifying, they operate only prospectively and do not require the commissioner to revoke petitioner's license now. The commissioner's revocation of petitioner's license under the mistaken belief that he was required

to do so amounts to an “erroneous abdication of discretion,” and as such, was an abuse of his discretion.⁴ See *King*, 488 Mich at 216.

We reverse the decision of the OFIR and circuit court and remand the matter to the OFIR for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jane M. Beckering
/s/ Karen M. Fort Hood
/s/ Cynthia Diane Stephens

⁴ Because we are reversing the decision of the OFIR and circuit court, we need not address petitioner’s arguments regarding due process and estoppel.